Love, or harassment? How employers should deal with a touchy issue
Author(s): Paul C. Buchanan
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# Love, or

## How employers should deal with a touchy issue

**By Paul C. Buchanan**

With Americans spending more and more time at work, and with workplaces becoming increasingly integrated between the sexes, it is hardly surprising that many employees find themselves striking up romantic relationships with their co-workers. Recent surveys indicate that 59 percent of employees have had a romantic relationship with a co-worker and that one-third of all romantic involvements started in the workplace.

But while romance may be blooming on the job, the law governing the American workplace has become increasingly intolerant of all kinds of sexual language or behavior at work. Unlike much of the rest of American culture, which has become saturated with sexual language and imagery, the one place where Americans spend most of their waking hours — the workplace — has become, by force of law, a kind of zero-tolerance zone for sexual expression of any kind. As a result, employers increasingly are called on to act like the parents of a love-struck teen-ager, closely monitoring activities and doling out stern lectures about responsible behavior.

Even relationships between co-workers that are entirely consensual are legitimately viewed by employers as creating substantial risks. By some counts, 50 percent of sexual-harassment lawsuits arise out of workplace relationships that started out as consensual. And workplace romances can lead to other legal complications as well, including perceptions of favoritism (that later become discrimination lawsuits) and conflicts of interest.

Not surprisingly, many employers are acutely uncomfortable with their new-found role as surrogate parents to their amorous employees. Many see personal relationships as just that — personal — and they are understandably reluctant to inject themselves into the middle of employees' romances. However, it is typically at some later stage in a romantic relationship — the stage when the romance is gone — that the folly of a laissez-faire approach becomes apparent.

This is especially so in the case of a relationship between a manager or supervisor and an employee who is lower in the company's hierarchy. When these romances break up, the ramifications in the workplace can be particularly significant, leading in some cases not only to strained workplace relations and poisoned employee morale, but to claims of quid pro quo or hostile-work-environment sexual harassment.

A hostile-work-environment claim may arise out of sexual or other gender-related comments or actions in the workplace, and a quid pro quo claim may arise out of an allegation that continued employment or advancement in the company was contingent on continuation of a sexual relationship.

Over the last three years, the U.S. Supreme Court has issued several decisions that make clear that employers who take affirmative steps to prevent harassment and discrimination in the workplace may be rewarded with defenses in harassment cases, even if harassment by a supervisor or manager actually occurred. These defenses may prevent liability altogether or reduce the damages that the plaintiff in such a lawsuit can seek — especially, punitive damages that are designed to punish an employer for bad conduct.

In particular, the Supreme Court has ruled that employers who can prove they have effectively communicated appropriate sexual-harassment policies to their employees and have taken reasonable steps to prevent harassment may, in some circumstances, be able to avoid liability if the

*Buchanan is a partner at Stoel Rives LLP in Portland, Ore. His e-mail is pbuchanan@stoel.com.*



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# harassment?

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employee then fails to make use of the company's procedures to bring the problem to the company's attention before making the issue into a lawsuit.

Employers who have listened to the messages being sent by the Supreme Court, and who have learned (some of them the hard way) that workplace romances frequently flower into harassment and other discrimination claims down the road, know that they should act when romance takes hold at work. The hard question that employers face, however, is what is the appropriate response to the delicate issues raised by a romance between employees?

Several years ago, the popular press made much of so-called "love contracts" that some employment lawyers devised to deal with workplace romances. Of course, these "contracts" are not really enforceable legal agreements of any kind.

While they serve many worthwhile goals, such as confirming the voluntary nature of the relationship and advising employees of the company's sexual-harassment policy, many employers find that this legalistic-seeming approach is too contrived and formal, and, as a result, they opt to do nothing at all. In most situations, employers are best served by taking the kind of common-sense and individualized approach that is described below.

Of course, the proper response to the office romance depends on the circumstances of the individual relationship. Generally speaking, there are three broad categories of workplace romances that each call for a somewhat different approach:

- romance between a manager and his or her direct subordinate,
- romance between a manager and someone lower down in the organization who does not directly report to the manager, and
- romance between co-workers who have equal standing in the organization.

And, of course, even within each of these categories, the facts and circumstances of each situation will be unique, and the response should be adjusted accordingly.

## Common sense works best.

The most problematic types of workplace romance are those that arise between a manager and an employee who directly reports to the manager. This type of relationship usually presents a genuine conflict of interest for the manager who, by virtue of his or her position is charged with evaluating the employee's work on behalf of the company, making promotion decisions, doling out assignments, creating schedules, and so on.

This type of relationship may also set the stage for a subsequent claim of quid pro quo harassment when the romance goes sour and the subordinate employee does not get a desired promotion or, worse, is terminated or demoted. The claim in this scenario, of course, is that the subordinate employee's job advancement was contingent on continuation of the sexual relationship.

Employers generally are well advised to address these kinds of relationships in a clear conflict-of-interest policy that requires disclosure of any such relationship and that makes clear that the company strongly discourages these relationships and may take necessary steps to address the situation.

When such a relationship arises, the employer may need to instruct the love-struck employees that, as a result of the relationship, they cannot both continue in their current positions, and that transfer or termination of one or both employees may be required. Before making this kind of a determination, employers should consult with legal counsel as such a decision, especially if it negatively affects the subordinate employee, may also give rise to legal complications.

While not as perilous for the employer as a romance between employees in a direct reporting relationship, a romance between a manager and a regular employee who are not in a reporting relationship also holds numerous possibilities for trouble. The romantics often forget that, while they may not be in a direct reporting relationship today, organizations are fluid and six months from now the manager may be asked to manage the part of the organization where his or her "significant other" works.

And even if the manager has no direct supervisory responsibility for his or her love-interest at any time, there is, of course, a power differential in such a relationship that may later be claimed to have prevented the subordinate employee from complaining about harassing conduct.

When dealing with such a relationship, it generally is advisable to meet separately with the employees involved to ensure that the relationship truly is voluntary and to advise the employees of the sexual-harassment policy and the importance of appropriate, professional behavior in the workplace. The particular complaint mechanism in the harassment policy should be underscored, particularly with the lower-level employee, so that the employee clearly knows how to notify the company if things go sour in the workplace as a result of the relationship.

Because the employer ultimately will have to prove that it effectively communicated to the employee about these issues if the company finds itself sued for sexual harassment, the issues discussed should be well documented. In many cases, the most appropriate



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format for this communication will be a memorandum from the human resources manager that summarizes these points, along with a copy of the company's harassment policy. The memorandum should include a place for the employee to sign to indicate an understanding of the contents of the memorandum and of the sexual-harassment policy.

In the meeting with the managerial employee who is romantically involved with a lower-level employee, the critical information to be imparted (along with the harassment policy) is that the manager must not let the relationship interfere with the employee's job or working environment — and that any transgression of that expectation will result in discipline that may take the form of termination of employment. That admonition should be captured in a document that the company can point to later if things turn ugly.

A manager who engages in a romantic relationship with a lower-level employee should be made to understand a hard truth: If any difficulties ensue in the workplace as a result of the relationship, the company will have every incentive from a legal standpoint to have the manager pay the full price. For example, if the relationship goes sour and it becomes difficult for the two former lovers to work together, transfer or termination of the subordinate is almost impossible as it is likely to lead to a troublesome claim of quid pro quo sexual harassment.

By contrast, transfer or termination of the manager, while often more difficult from a business point of view, is much less likely to be vulnerable to a legal challenge. Consequently, managers should be aware that choosing to enter into a romantic relationship with an employee may put their careers at risk.

The kinds of well-documented communications with employees described above help to ensure not only that the company is well positioned to defend any subsequent litigation that might ensue, but also to minimize the chances that the situation will turn out badly in the first place by making expectations, standards and limitations clear to all involved.

**Careers may be put at risk.**

Relationships between co-workers who have parity in the company hierarchy are less likely to create legal headaches for the employer, so long as both employees conduct themselves appropriately at work. This is particularly true in companies that have many employees because a single romance among equals in that setting is unlikely to have a significant impact on the rest of the workforce.

In most cases, the best approach for dealing with these kinds of relationships is to focus on the employee's workplace conduct. If it remains appropriate and professional, there usually will be little cause for concern. However, employers should remain mindful that even relationships between equals can give rise to complications, particularly when a relationship breaks up or the company's organizational structure changes so that the lovers (or antagonistic former lovers) are no longer equals in the corporate structure.

Depending on the circumstances, the kind of documented communications regarding the company's sexual harassment policy described above may be advisable even when the relationship is one between equals in the organization.

Realistically, employers cannot ban romantic relationships altogether without risking getting sued for marital-status discrimination (on the theory that employees who are married to each other receive better treatment) or under other legal theories. And an outright ban may be undesirable in any event, not only because of the employee morale impact, but because such a ban is likely to encourage secrecy and to serve as an excuse that a court may recognize as valid for an employee not to bring an internal complaint of harassment to the company before proceeding to court, which may result in increased liability for the employer.

In the end, employers — like the parents of a libidinous teen-ager — will be best served in most situations involving romance between co-workers by clearly communicating expectations and consequences. But unlike parents (whose motives probably are loftier than preventing lawsuits), employers need to remember that the goal of avoiding liability is best advanced when those communications have been set forth in clear documentation. *blt*

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